

Appeal from a decision of the Oregon State Office, Bureau of Land Management, which nullified and rejected notice of location for the Yokum No. 3 "Home" mining claim, OR MC 16179.

Reversed.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Recordation

Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of a mining claim located before Oct. 21, 1976, must file a notice of intention to hold or evidence of performance of annual assessment work on the claim on or before Oct. 22, 1979, and prior to Dec. 31 of each year thereafter. This requirement is mandatory and failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and renders the claim void.

2. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Abandonment

The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself. A matter of law, it is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences.

3. Administrative Procedure: Adjudication -- Evidence: Generally -- Evidence: Presumptions -- Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Abandonment

In enacting the Federal Land Policy and Management Act of 1976 (43 U.S.C. § 1744 (1976)) Congress specifically placed the burden on the claimant to show that the claim has not been abandoned by his compliance with the Act's requirements, and any failure of compliance produces a conclusive presumption of abandonment.

4. Mining Claims: Abandonment

At common law, evidence of the abandonment of a mining claim would have to establish that it was the claimant's intention to abandon and that he in fact did so. The burden of proof of the intent to abandon rests upon the party who asserts it, and the proof must be clear and convincing. Where the evidence is persuasive that a notice of abandonment mistakenly described the wrong claim, and that the claimant thereafter remained in occupancy and possession for many years, there was neither an intent to abandon nor actual abandonment, and the erroneous notice may be repudiated.

APPEARANCES: Loy Yokum, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Loy Yokum has appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), which nullified his notice of location, received by BLM on June 29, 1979, for the Yokum No. 3 "Home" mining claim, and which rejected for recordation appellant's 1979 and 1980 proof of labor filings for that claim under section 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR Subpart 3833. The claim had been located on May 13, 1931.

According to information of record with BLM, appellant signed a notice of abandonment for the Yokum No. 3 "Home" mining claim on November 10, 1971, and the notice was recorded in volume 77, page 937, Josephine County mining records. On September 3, 1980, appellant signed a letter affidavit stating

that he had intended to abandon a different claim, but that the Yokum No. 3 claim was mistakenly identified on the 1971 notice of abandonment. The 1980 affidavit was recorded in volume 5, page 263, of the Josephine County records, on September 3, 1980.

In his statement of reasons for appeal, appellant states that he had intended to abandon the "Sunrise" claim which is located on adjoining ground, but, by mistake, recorded on the same book and page in the county records, the unnamed claim (now called the "Home" claim) which is the subject of this appeal. Appellant asserts that BLM employees erred in drafting the document which appellants signed in good faith; and that BLM, having erred, should bear the responsibility of correcting the mistake.

In 1975 appellant had filed a letter through an attorney seeking clarification of the matter. Further, besides denying any intent to abandon the mining claim on which his house stands, appellant has, for many years, been in actual and notorious possession of the claim as his residence.

In resolving this appeal, appellant's residence on the Yokum No. 3 "Home" mining claim; appellant's explanation of a mistake in claim identification on the 1971 notice of abandonment; and possible mistakes by BLM employees relating to the 1971 notice are considerations.

[1] Under section 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of a mining claim located on or before October 21, 1976, must file notices of intention to hold the claim, or evidence of the performance of annual assessment work on the claim, in the proper BLM office on or before October 22, 1979, and prior to December 31 of each year thereafter. Failure to comply constitutes an abandonment of the claim by the owner. James V. Brady, 51 IBLA 361 (1980).

[2] In enacting the statute, Congress did not invest the Secretary of the Interior with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences. Thomas F. Byron, 52 IBLA 49 (1981).

[3] Under the Federal Land Policy and Management Act of 1976, the Congress specifically placed the burden on the claimant to show that the claim has not been abandoned by complying with the requirements of the Act, and any failure of compliance produces a conclusive presumption of abandonment. Accordingly, extraneous evidence that a claimant intended not to abandon may not be considered. Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981). In that decision, however, 87 lode mining claims, location notices for which previously had been recorded with BLM, were deemed to be abandoned and void because of the failure of the claimants to file with BLM either affidavits of assessment work performed or notices of intention to hold the claims. As all of the claims had been located prior to October 21, 1976, such affidavits or notices of intent were required to be submitted to BLM on or before October 22, 1979, as provided by statute and regulation. 43 U.S.C. § 1744 (1976); 43 CFR 3833.2-1(a). In the present situation, affidavits and notices were submitted;

thus the provisions of the Federal Land Policy and Management Act of 1976 were satisfied. In its decision, BLM noted that there is no statute permitting BLM to accept the 1980 affidavit as reforming the 1971 notice of abandonment. In the absence of such a statute, however, the common law rules relating to abandonment come into play.

[4] At common law, to establish an abandonment of property, actual acts of relinquishment accompanied by intention to abandon must be shown. The primary elements are the intention to abandon and an external act by which that intention is carried into effect. While an abandonment may arise from a single act or from a series of acts, the intent to abandon and the act of abandonment must operate together. It is not enough that the owner's acts give reasonable cause to others to believe that the property has been abandoned. Abandonment of property involves a conscious purpose and intention on the part of the owner neither to use nor to retake the property into his possession, and necessarily involves an act by which the possession is relinquished, and this must be a clear and unmistakable affirmative act indicating a purpose to repudiate the ownership. Mere relinquishment of the possession of a thing is not an abandonment of it in the legal sense of the word, for such an act is not wholly inconsistent with the idea of continuing ownership; the act of abandonment must be an overt act or some failure to act which carries the implication that the owner neither claims nor retains any interest in the subject matter of the abandonment. The moment the intention to abandon and the relinquishment of possession unite, the abandonment is complete. Time is not an essential element of abandonment. 1 Am. Jur. 2d, Abandoned Property §§ 13, 16 (1962). See Farrell v. Lockhart, 210 U.S. 142 (1908).

Abandonment is a question of fact, and the claimant's intent must be determined from all the evidence. The burden of proof of the intent to abandon rests upon the party who asserts it, and the proof must be clear and convincing. United States v. Cowan, 396 F.2d 83 (2d Cir. 1968); Friedman v. United States, 347 F.2d 697 (8th Cir.), cert. denied, 382 U.S. 946, 86 S. Ct. 407, 15 L. Ed. 354 (1965).

In the present situation appellant filed a notice of abandonment in 1971. Alone, that filing constitutes a prima facie presumption that the appellant wished to abandon the claim. Appellant has shown, however, that the filing was a mistake, that there was no actual intent to abandon, and that there has been no abandonment as a matter of fact. For many years, appellant has been in actual and notorious possession of the claim and has resided there, allegedly, since 1931. BLM confirms that it has been his home for many years. Moreover, in 1960 BLM mineral examiners inspected the group of claims and reported four of them to be valid, including the Home claim. In effect there has been neither intent nor acts of abandonment and BLM improperly nullified appellant's notice of location, and improperly rejected for recordation appellant's 1979 and 1980 proof of labor filings for the subject claim.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

Edward W. Stuebing
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Gail M. Frazier
Administrative Judge

